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Nos. 82-524, 82-545, and 82-551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BALTIMORE GAS AND ELECTRIC CO., *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Respondent.

UNITED STATES NUCLEAR REGULATORY COMMISSION, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

COMMONWEALTH EDISON COMPANY, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS BALTIMORE GAS AND ELECTRIC COMPANY, *ET AL.*

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REPLY BRIEF FOR PETITIONERS BALTIMORE GAS AND ELECTRIC COMPANY, *ET AL.*

ARGUMENT

The National Environmental Policy Act of 1969 (NEPA) addresses the future and calls upon federal agencies to determine and disclose how their proposals will interact with the environment. It does this in simple

and direct language, calling for "a detailed statement . . . on . . . *the environmental impact* of the proposed action . . . [and] any *adverse environmental effects* which cannot be avoided." [1] Since NEPA looks to the future, it contemplates disclosure of what may be termed "risks." [2] However, by calling for disclosure of "*the* environmental impact," it contemplates that an agency select from the spectrum of potential "risks" the actual effect that the Agency believes will result from implementation of the proposal.[3]

In this case, the Commission conducted a rulemaking to identify certain generic environmental effects associated with future operations of its licensed facilities (*i.e.*, the annual uranium fuel cycle impact associated with operation of an individual nuclear power plant). After considering in this rulemaking the spectrum of potential environmental consequences of long-term waste disposal, the Commission selected the one which it concluded represented the "environmental impact" that would be caused by licensing an individual plant. The court below set aside

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[1] National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1976) (emphasis added), *Pet. App.* 432a. [Citations to "*Pet. App.*" refer to the Appendix to Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit filed by Baltimore Gas and Electric Co., *et al.* on September 24, 1982. An identically paginated appendix was also filed by Commonwealth Edison Company, *et al.*]

[2] A "risk" is something that has a chance of occurrence (whether that chance is virtually nil or very likely) rather than a certainty of occurrence. WEBSTER'S NEW WORLD DICTIONARY 1228 (2d College ed. 1982); *see infra* note 12.

[3] Brief of Petitioners Baltimore Gas and Electric Co., *et al.* (hereinafter "BG&E Brief") at 25-26; *see infra* text at 5-6 & n.13. In making this selection, an agency must comply with the "reasoned decisionmaking" requirements of the Administrative Procedure Act (APA). 5 U.S.C. § 551, *et seq.* (1976). To do so, it must look at the spectrum of potential risks and provide a rationale for choosing the one which it believes will represent the "environmental impact" of the proposal. BG&E Brief at 21; *infra* text at 7-8.

this rulemaking determination on the ground that NEPA requires the NRC to evaluate and disclose in each individual environmental impact statement (EIS), for each potential interaction, the entire spectrum of risks associated with that interaction, together with estimates of the probability of occurrence of each risk. As a result, according to the court below, NEPA precludes the Commission from looking at the spectrum of potential risks of long-term waste disposal and selecting the risk that it believes represents the "environmental impact" of its proposals.[4]

In defending this holding, Respondents largely focus on the case law of lower courts. Unfortunately, over the years, the lower courts have strayed further and further from the language of NEPA, basing their opinions on a NEPA vocabulary created by the courts themselves. In other words, rather than interpreting the will of Congress as expressed in the words of the statute, these courts have proceeded to develop, on their own, what has been called "a 'common law' of NEPA."[5] In this tradition, the court below created from its prior precedents new and novel NEPA responsibilities that find no support in NEPA's language.[6]

This case presents this Court with the opportunity to return to the words of NEPA and firmly reject the theory that the courts are empowered to create ever-expanding NEPA obligations through a process of judicial declaration. While the "common law" evolves, it is basic to our constitutional system that statutory law is the creation of Congress and remains constant until changed by its creator. It is this principle which has been ignored by Respondents and by the court below. It is this

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[4] *See* BG&E Brief at 18.

[5] Sierra Club v. Sigler, 695 F.2d 957, 965 (5th Cir. 1983), *quoting* Kleppe v. Sierra Club, 427 U.S. 390, 421 (1976) (Marshall, J., concurring in part and dissenting in part).

[6] BG&E Brief at 17-18, 24-28.

principle that must be affirmed in this case through rejection of the lower court's holdings.

I. NEPA § 102(2)(C) Requires Disclosure of the "Environmental Impact" of a Proposed Action, and Not Ranges of Potential, Uncertain Risks

The majority below interprets NEPA § 102(2)(C) to require that each EIS prepared by a federal agency identify each "potential environmental effect" together with the entire range of risks inherent in the effect—from the risk that a particular effect would not occur or would have only minor consequences, to the risk (however remote) that it would occur and cause extensive damage.[7] The court below predicated this holding on its construction of the term "environmental costs," a term which was coined by the D.C. Circuit in *Calvert Cliffs'* [8] but nowhere appears in NEPA.[9]

NRDC, in its brief, attempts to avoid the force of NEPA's language by suggesting that the lower court's holding is somehow supported by a reference in the legislative history of NEPA to "*total* environmental impact." [10] This reference, together with lower court decisions interpreting NEPA's disclosure obligations, leads NRDC to conclude that the Commission must disclose in each EIS the spectrum of risks associated with each potential environmental effect.[11]

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[7] *See* NRDC v. NRC, 685 F.2d 459, 478-80 (Bazelon, J.) (hereinafter "*NRDC II*"), *Pet. App.* 36a-39a.

[8] Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1114-16 (D.C. Cir. 1971).

[9] *See* BG&E Brief at 17 & n.44.

[10] Brief for Respondent Natural Resources Defense Council (hereinafter "NRDC Brief") at 24-25 (emphasis in original).

[11] NRDC Brief at 25-28. The cases relied upon by NRDC do not support this conclusion. Those cases only address the threshold question of whether a potential environmental effect is "significant" enough to require an agency to prepare an EIS to evaluate the risks associated with that potential effect to determine what the "environmental impact" of its proposal will be. None of these cases

NRDC's reliance on the legislative history reference to "total environmental impact" shows that Respondents simply fail to understand that the terms "impact" and "adverse effect" (which appear in § 102(2)(C) of NEPA) are not synonymous with the word "risk" (which does not).[12] By directing federal agencies to discuss a proposal's "impact" and "adverse effects," Congress called upon those agencies to predict what *would occur* in the future if the proposal were implemented, not everything that *might happen* as a result of implementation.[13] Had Congress intended that agencies discuss every possible

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dictate that an agency must select any particular risk as an "environmental impact" if the agency's evaluation leads it to conclude that some other risk represents the impact of its proposal. *See, e.g.*, Township of Lower Alloways Creek v. Public Service Electric & Gas Co., 687 F.2d 732 (3d Cir. 1982) (court upheld NRC's determination that expansion of a spent nuclear fuel pool was not "significant" under NEPA and thus required no EIS); Rucker v. Willis, 484 F.2d 158 (4th Cir. 1973) (court ruled that Corps of Engineers did not abuse its discretion in granting a permit for construction of marina and piers in the Outer Banks without preparing an EIS); Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421 (5th Cir. 1973) (Court of Appeals upheld District Court's refusal to enjoin federal funds for low income housing project, holding that HUD's "Environmental Clearance Worksheet" was sufficient).

[12] "Impact" and "adverse effect" signify the occurrence of harm; "risk" signifies that there is a *possibility* (whether remote or likely) that harm might occur. Congress has recognized this distinction and has never used the two terms interchangeably. For example, the Clean Air Act uses "adverse effect" and "risk" to signal very different tests for regulatory action—the former contemplates a showing of demonstrable harm and the latter only a showing that there is a possibility of harm. Clean Air Act, §§ 109, 112, 211, 42 U.S.C. §§ 7409, 7412, 7545 (Supp. IV 1980); *see* Ethyl Corp. v. EPA, 541 F.2d 1, 24-29 (D.C. Cir. 1976); Amoco Oil Co. v. EPA, 501 F.2d 722, 740-41 (D.C. Cir. 1974); Carolina Environmental Study Group v. United States, 510 F.2d 796, 799 (D.C. Cir. 1975).

[13] *See, e.g., Carolina Study Group*, 510 F.2d at 799; Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1091-92 (D.C. Cir. 1974); Scientists' Institute for Public Information, Inc. v. AEC, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

future contingency in each EIS, it would have required disclosure of all "environmental risks" or "potential effects," or used any number of other terms which contemplate that agencies list mutually exclusive future contingencies. Instead, Congress chose words which signal that agencies select from those mutually exclusive contingencies the one which best represents the future consequences of a proposal.[14]

While NEPA authorizes an agency to select from a spectrum of mutually exclusive future contingencies, NRDC is incorrect in suggesting that the Commission could ignore significant environmental risks if NEPA were construed in this manner.[15] To the contrary, in order to satisfy the APA "reasoned decisionmaking" requirement, the Commission must evaluate the spectrum of potential risks in selecting the "environmental impact"

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[14] The original CEQ regulations reflect this understanding. Those regulations required discussion in an EIS of *"the probable impact* of the proposed action on the environment," and not ranges of risks. 35 Fed. Reg. 7,390 (1970). The current CEQ regulations also talk in terms of disclosing "environmental impacts," and not "potential environmental risks." *See* 40 C.F.R. § 1502.16 (1982); *see also* 10 C.F.R. §§ 51.20(a)(1), 51.23(d) (NRC regulations implementing NEPA). Nevertheless, NRDC argues that the "worst case" analysis requirement of the new CEQ regulations was violated by the Table S-3 Rule. As Petitioners have pointed out, these CEQ regulations do not govern this rulemaking. NRC Reply Memorandum in Support of Petition for Certiorari at 1-3. In addition, since the impacts of the back-end of the fuel cycle are insignificant when considered in the context of other effects of plant licensing, the information presented in Table S-3 is not "important to the [licensing] decision," and therefore not subject to these regulations. *See* 40 C.F.R. § 1502.22 (1982); *see also infra* note 38; 42 Fed. Reg. 13,805 (1977), *Pet. App.* 248a-49a; 39 Fed. Reg. 14,190 (1974), *Pet. App.* 234a. Even if these regulations were applicable, the Commission performed a conservative analysis of the environmental impacts of nuclear waste disposal; the CEQ regulations require no more. *See* BG&E Brief at 12-14.

[15] NRDC Brief at 28-29.

of its proposal.[16] The Commission in this case fully evaluated the spectrum of potential fuel cycle effects before selecting values for Table S-3. It therefore satisfied its obligations and its decision should have been affirmed by the court below.[17]

Finally, it should be noted that, in its request for relief, NRDC appears to back away from the broad implications of the arguments in its brief by suggesting that a "brief narrative" describing risks and uncertainties is all that is needed to bring the Final Rule into compliance with NEPA.[18] Remand is not required, however, to satisfy NRDC's objective. The preamble of the Final Rule and the key documents referenced in the preamble already recognize and discuss the "uncertainties" surrounding the

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[16] Rather than allowing the Commission to "ignore" significant environmental risks, "reasoned decisionmaking" requires that in arriving at the "environmental impact" decision,

> that assumptions be stated, that process be revealed, that the rejection of alternate theories or abandonment of alternate courses of action be explained and that the rationale for the ultimate decision be set forth in a manner which permits the public to exercise its statutory prerogative of comment and the courts to exercise their statutory responsibility upon review.

National Lime Ass'n v. EPA, 627 F.2d 416, 453 (D.C. Cir. 1980).

[17] NRDC's interpretation of NEPA § 102(2)(C) to require listing of a range of risks rather than a decision as to the "environmental impact" of a proposed action is designed not to produce better decisions, but merely to ensure repeated adjudication in individual licensing proceedings of the same issues that the Commission resolved in the Table S-3 rulemaking proceeding. *See NRDC II*, 685 F.2d at 541-42 (Wilkey, J., dissenting), *Pet. App.* 173a-74a. The repeated adjudication of these identical issues in individual licensing proceedings will not benefit the public. *Id.* It should be emphasized, however, that licensing boards have the authority to use different release values than those in Table S-3 if it is shown that special circumstances exist in a particular case which justify waiver of the Rule under 10 C.F.R. § 2.758(b) (1982). The Commission also has indicated that it will periodically update the Table S-3 Rule to reflect newly obtained information. 44 Fed. Reg. 45,363 (1979), *Pet. App.* 344a; *cf. Scientists' Institute*, 481 F.2d at 1098.

[18] NRDC Brief at 50.

Commission's conclusion [19] and all of this material is available for consideration in individual licensing proceedings.[20] Equally important, NRDC's suggestion seems to constitute an admission that the court below erred in requiring much more than a "brief narrative" by directing that the NRC conduct detailed probabilistic analyses of all potential risks.[21]

II. The Commission Considered Relevant Factors and Drew Reasoned Conclusions in Adopting Table S-3

NRDC argues in its brief that the development of long-term waste repositories is fraught with uncertainties, and that in light of these uncertainties the Commission could not properly conclude that safe repositories would be developed.[22] The existence of uncertainties with respect to the future of long-term waste disposal, however, does not preclude the Commission from exercising its judgment to predict the environmental impact of this activity. Rather, it makes it all the more important that the Commission exercise its expert judgment and disclose what the impact will be.[23]

NRDC identifies three "risks" or "uncertainties" that it asserts the Commission failed to address in the Final Table S-3 Rule.[24] Review of the rulemaking record, however, shows that the Commission addressed these uncer-

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[19] 44 Fed. Reg. 45,367-69 (1979), *Pet. App.* 360a-70a; *see NRDC II*, 685 F.2d at 529-30 (Wilkey, J., dissenting), *Pet. App.* 146a-48a.

[20] *See* 44 Fed. Reg. 45,363, 45,368 (1979), *Pet. App.* 347a-48a, 367a; 40 C.F.R. § 1505.1(c), (d) (all relevant documents, comments, and responses are part of the record and shall accompany the proposal through the review process); *cf. National Lime Ass'n*, 627 F.2d at 427 n.32 (the preamble is an integral part of the rule).

[21] *NRDC II*, 685 F.2d at 478-79 (Bazelon, J.), *Pet. App.* 36a-37a; BG&E Brief at 31 & n.77.

[22] *See* NRDC Brief at 37-46.

[23] *See Scientists' Institute*, 481 F.2d at 1092.

[24] *See* NRDC Brief at 38-40.

tainties in its "environmental impact" decision, and explained how these uncertainties influenced its determination. NEPA and the APA require nothing more of the Commission in this rulemaking.[25]

First, NRDC complains that the Commission "made no real attempt" to show that a repository, once developed, would effectively isolate nonvolatile wastes from the environment.[26] The record shows that the NRC Staff decided to examine a technology—deep emplacement in stable bedded salt—for which the greatest amount of substantive information was available regarding environmental effects.[27] The Staff not only addressed the performance characteristics of bedded salt repositories, but also considered the various risks of natural and manmade

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[25] As the D.C. Circuit has repeatedly recognized, where an agency is required to resolve issues that are on the "frontiers of scientific knowledge," the agency must exercise its judgment to draw conclusions that are essentially "legislative" in nature. *See* Minnesota v. NRC, 602 F.2d 412, 417 (D.C. Cir. 1979) (concerning the likelihood that safe nuclear waste repositories would be developed); Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 474-75 (D.C. Cir. 1974); *Amoco Oil*, 501 F.2d at 740-41; *Ethyl Corp.*, 541 F.2d at 28. In such cases, a reviewing court must ensure that the agency has considered relevant factors and has drawn reasoned conclusions (that is, that the agency has engaged in "reasoned decisionmaking"). *National Lime Ass'n*, 627 F.2d at 453. As long as the agency has made a good faith effort to describe the "environmental impact" of its proposal, it has satisfied § 102(2)(C) of NEPA. *Scientists' Institute*, 481 F.2d at 1092; *cf.* NRDC v. NRC, 582 F.2d 166, 174-75 (2d Cir. 1978) (complete resolution of all technical aspects of permanent waste disposal issue is not required by Atomic Energy Act as a predicate to plant licensing). The Commission has consciously followed these directions in promulgating the Table S-3 Rule. *See* 42 Fed. Reg. 13,805 (1977), *Pet. App.* 248a-49a.

[26] NRDC Brief at 42.

[27] 44 Fed. Reg. 45,368 (1979), *Pet. App.* 364a; NUREG-0116, p. 2-9. The Commission further concluded that this technology would be reasonably representative of the impacts from any appropriately designed geological emplacement. *Id.*

breaches of these repositories, and found the risk of release to be insignificant in relationship to other environmental effects a licensing board must consider when deciding to license a power plant.[28]

Second, NDRC alleges that the Commission "assumed away" the risk that a waste repository might not be built.[29] This assertion is at variance with the record, which shows that the Commission identified salt deposits in 24 of the 50 States.[30] The Commission concluded that the large number of potentially favorable sites made it likely that sites would be found for development, in spite of the vague "political concerns" raised by Respondents.[31] This conclusion is reinforced by the recent Nuclear Waste Policy Act, which directs federal efforts towards the iden-

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[28] *See* 42 Fed. Reg. 13,805 (1977), *Pet. App.* 249a. Since all volatile wastes are assumed to be released to the environment prior to sealing the repository, the remaining material in the repository would be nonvolatile and susceptible to release to the environment only by a very remote event such as a meteorite strike. *See* BG&E Brief at 13-14.

[29] NRDC Brief at 42.

[30] 44 Fed. Reg. 45,368 n.22 (1979), *Pet. App.* 366a n.22; NUREG-0116, § 4.4.1.2.

[31] NRDC Brief at 12. The Commission concluded that the political concerns raised by NRDC could be overcome, if necessary, by legislative action. This conclusion is reasonable, since states themselves have an interest in safely disposing of waste that has been generated within their borders. Recent legislation providing for identification of development of waste repositories bears out the reasonableness of this conclusion. Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201 (1983). Specifically, § 115 of that Act permits the United States Congress to overrule a state's disapproval of the siting of a waste repository. 96 Stat. 2217-20 (1983). Thus, a mechanism exists for overcoming political concerns. *See NRDC v. NRC*, 582 F.2d at 175 ("resolving the problem of [political] 'resistance' [to permanent waste disposal] must come from the legislative branch of government"); *cf. Minnesota v. NRC*, 602 F.2d at 416 (focus of inquiry was whether there is a "reasonable probability that a solution [to the waste disposal problem] will be available when needed").

tification and development of sites,[32] and by the Department of Energy's recent identification of the first of five waste repository sites for in-depth study.[33]

Third, NRDC complains that the Commission has not adequately considered the risk of what might happen to waste while it is awaiting disposal.[34] This complaint is simply incorrect. The Commission fully considered the environmental effects of waste reprocessing, temporary interim storage and transportation to permanent repositories.[35] In addition, the Commission included in the Table S-3 Rule values that represent the release of all volatile radionuclides to the environment prior to disposal. As is explained in Petitioners' Brief, these are the portions of the nuclear waste that can be dispersed and hence are most likely to affect the environment.[36]

The rulemaking record thus shows that the Commission traced the nuclear waste from the plant to the permanent repository—through reprocessing, transportation, presealing, and post-sealing stages—and conservatively predicted for purposes of individual plant licensing what the "environmental impact" of waste disposal would be.[37] The Commission concluded that releases would in fact take place at each step except after permanent sealing of a repository. It assigned a "zero release" value to this last step since it found that the potential impacts of post-sealing releases were so small as to have no influence on

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[32] Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, §§ 112-114, 96 Stat. 2208-17 (1983).

[33] 48 Fed. Reg. 9,578 (1983).

[34] NRDC Brief at 39.

[35] *See generally* NUREG-0116, Chapters 2 and 4; *see* BG&E Brief at 12-14.

[36] BG&E Brief at 12-13.

[37] *Id.* at 10-14.

the licensing decision.[38] In arriving at these rulemaking conclusions the Commission did not "exclude" consideration of any risks, but addressed even remote risks explicitly in its analysis.[39]

In summary, at each step of this proceeding, NRDC has reiterated that uncertainties surround the waste disposal issue. At each step, the Commission has addressed these uncertainties. While the Commission's conclusions do not represent a final engineering solution to the uncertainties involving the mechanics of waste repositories, the Table S-3 rulemaking was simply not intended to resolve the many complex, technical issues surrounding

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[38] NRDC argues that in close cases, consideration of post-sealing releases could "tip the balance. . . ." NRDC Brief at 33-34. This is simply not true. In the more than 90 licensing decisions that have been made since issuance of the Original Rule, the environmental impacts of waste disposal have not had an effect on the final licensing decision. For example, in *In re* Public Service Electric & Gas Company, *et al.* (Salem Nuclear Generating Station Units 1 and 2), 6 NRC 206 (1977), a group of Appeal Board members decided that none of the cost-benefit balances struck for 11 facilities was sufficiently close to "virtual equipoise" that the modified values for the back-end of the fuel cycle contained in the Interim Rule could possibly affect the licensing decision. *Id.* at 209-210. This result is perfectly understandable, since the Commission has concluded time and again in the context of the Table S-3 Rule that these impacts are "relatively insignificant" in terms of all of the other effects of plant licensing. *See* 44 Fed. Reg. 45,364, 45,365 (1979), *Pet. App.* 349a, 352a.

NRDC's reliance on an NRC Appeal Board's decision in *In re* Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), 8 AEC 79 (1974), to support its argument is misplaced. The case involved the question of whether or not the Licensing Board should have applied the just promulgated Original Table S-3 Rule in the cost-benefit balance for these nuclear units, and not whether the environmental impacts of the back-end of the fuel cycle would have an influence in that case. *Id.* at 85-88.

[39] BG&E Brief at 14. As the D.C. Circuit has observed, "[r]ecognition of the minimal probability of . . . an event is not equatable with nonrecognition of its consequences." *Carolina Study Group*, 510 F.2d at 799.

nuclear waste disposal.[40] Rather, as a "decisional tool" designed to reflect the Commission's best judgment of the "environmental impact" of nuclear waste disposal, Table S-3 represents a reasonable exercise of the Commission's rulemaking authority.[41]

CONCLUSION

For the reasons stated above, the Commission has done all it is required to do under the APA to support its rulemaking determination of what the "environmental impact" of nuclear waste disposal will be. The Final Rule discloses this determination and requires that this environmental impact be considered in each individual licensing proceeding; NEPA requires nothing more. Accordingly, this Court should reverse the decision of the court below and affirm the Table S-3 Rule.

Respectfully submitted,

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[40] *NRDC II*, 685 F.2d at 527-28 (Wilkey, J., dissenting), *Pet. App.* 142a-44a; *cf. NRDC v. NRC*, 582 F.2d at 171-75; *Scientists' Institute*, 481 F.2d at 1092. As noted above, mechanisms are available to include new information in the decisionmaking process as new information is developed. *See supra* note 17.

[41] *See NRDC II*, 685 F.2d at 545 (Wilkey, J., dissenting), *Pet. App.* 181a; BG&E Brief at 29-30; *cf. Scientists' Institute*, 481 F.2d at 1092.